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SUPREME COURT, U.S.

No. 80-1463

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

R. C. MARSHALL, Superintendent
Southern Ohio Correctional
Facility,

Petitioner,

v.

ROBERT LONBERGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

BRIEF IN OPPOSITION TO CERTIORARI

John Czarnecki, Esq.
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Norman G. Zemmelman, Esq.
BRITZ & ZEMMELMAN
340 Spitzer Building
Toledo, Ohio 43604

Counsel for Respondent

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 635 F.2d 1189.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1980. A petition for rehearing was denied on December 30, 1980 (Pet. App. A13 - A14). The petition for a writ of certiorari was filed on February 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STWARD, COOPER,
TRAUB, WALINSKI
& CRAMER
LEGAL PROFESSIONAL
ASSOCIATION
[illegible] ADAMS STREET
[illegible], OHIO 43624

QUESTION PRESENTED

Whether submission of a constitutionally infirm conviction to the jury in a subsequent trial may be cured with a simple cautionary instruction.

STATEMENT

On or about February 1, 1975 respondent was charged with the offense of aggravated murder in Lucas County, Ohio. Appended to the indictment was a specification alleging that he had "previously been convicted of an offense of which the gist was the purposeful * * * attempt to kill another * * *." A finding on the specification would result in a possible imposition of the death penalty. Respondent sought to dismiss the specification on the grounds that the conviction to which it referred was based upon an involuntary plea of guilty. A full hearing was held at which defendant took the stand and denied that he had been aware of the nature of the charge to which he entered a plea. The state declined to offer testimony. The trial court denied the motion and the conviction statement (with indictment appended) was given to the jury. A conviction was returned on both the substantive offense and the specification and the death penalty was imposed. The Ohio Court of Appeals for the Sixth District determined that the State had failed to prove the offense of aggravated murder, reversed that conviction and

FWARD, COOPER,
RAUB, WALINSKI
& CRAMER
GAL PROFESSIONAL
ASSOCIATION
0 ADAMS STREET
EDO, OHIO 43624

entered a final judgment of guilty on the offense of murder. (Pet. App. A31 - A49). The Ohio Supreme Court refused to accept jurisdiction finding that the case "presented no substantial constitutional question."

The petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 which was denied by the district court. (Pet. App. A16 - A30). The United States Court of Appeals for the Sixth Circuit reversed the district court finding that the state had failed to prove, by clear and convincing evidence, that petitioner had understood the earlier charges against him and that therefore his assertion that it was not knowledgeable should have been sustained. (Pet. App. A1 - A14). Introduction of an invalid conviction in a subsequent trial was held to require reversal under the rule announced by this Court in Burgett v. Texas, 389 U.S. 109 (1967).

ARGUMENT

1. Petioner has made its argument far more complex than either the facts or the applicable law warrant. To suggest that this case "presents an important issue of constitutional law regarding the scope and vitality of this Court's decision in Spencer v. Texas, 385 U.S. 554 (1967)" is to ignore a critical distinction between the two cases, a distinction raised, and decided, in Burgett v. Texas, 389 U.S. 109 (1967).

TYWARD, COOPER,
TRAUB, WALINSKI
& CRAMER
LEGAL PROFESSIONAL
ASSOCIATION
ADAMS STREET
LEDO, OHIO 43624

In Spencer, the Court decided that the state had a legitimate interest in allowing the introduction of prior valid convictions to enhance the penalty for a subsequent offense, assuming, of course, a proper cautionary instruction to the jury.

Within nine months after deciding Spencer, the Court was confronted with Burgett, another Texas case, in which the jury had been advised of prior convictions which were constitutionally infirm.

Even though the defendant in Burgett had not suffered an enhanced penalty and the jury had been admonished not to consider the prior crimes as evidence of guilt in the case at bar, the conviction was reversed. Although, as the Court noted, it does not "sit as a court of criminal appeals to review state cases," it will review state rules of evidence which act to abridge individual constitutional guarantees. Coerced confessions, illegally seized evidence, denial of the right of confrontation and, as in Burgett itself, denial of the right to counsel would all impel the Court to interject itself in state criminal proceedings.

Petitioner herein seeks to denigrate the ruling below by characterizing it as a "highly prophylactic on the record rule with respect to the validity of a guilty plea." He would have the Court limit the effect of Burgett to prior convictions secured in violation of some "specific" 1/ constitutional guarantee.

1/ Petitioner fails to enumerate those guarantees which fit his definition of "specificity."

SAYWARD, COOPER, STRAUB, WALINSKI & CRAMER
A LEGAL PROFESSIONAL ASSOCIATION
ONE ADAMS STREET
TOLEDO, OHIO 43624

This case is not one that presents a simple formal failure of the requirements of Rule 11, F.R.Cr.P. Respondent denies that he was ever advised of the charge to which he was entering a plea. The transcript of the 1972 proceedings in Chicago support his assertion and the Ohio prosecutor produced no extrinsic evidence from which a contrary finding could be made. It is difficult to conceive of a more specific and fundamental right than to be apprised of the charge to which a plea is being entered. It has been held that unless the defendant received full notice of the notice of the charge against him, he has been deprived of the "first and most universally recognized requirement of due process". Smith v. O'Grady, 312 U.S. 329 (1940).

The court of appeals quite properly refused to allow a conviction so secured to work a further deprivation of the respondents' rights by allowing the state to introduce it in a subsequent criminal prosecution, with or without a cautionary instruction.

2. The petitioner contends that the court of appeals should have remanded the matter to the district court for an evidentiary hearing, citing Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975).

Roddy was a case involving the initial attack upon the voluntariness of a plea entered in a state court. Brought under 28 U.S.C. 2254, the district court quite properly conducted an evidentiary hearing to allow the state an opportunity

HAYWARD, COOPER, STRAUB, WALINSKI & CRAMER
A LEGAL PROFESSIONAL ASSOCIATION
ADAMS STREET
TOLEDO, OHIO 43624

to clarify and explain an inadequate record.

In the instant case, however, the district court (and subsequently, the court of appeals) were simply reviewing the record of what should have been a full and complete hearing conducted in the Ohio trial court. The respondent expressly raised the legitimacy of the earlier plea and conviction with a motion to dismiss the specification. The trial court held an evidentiary hearing at which the state was given an opportunity to present whatever evidence it had on the issue. It is simply untrue to assert, as the petitioner has, that "[T]he extent to which petitioner had actual notice and understanding * * * is not of record due to the refusal of the circuit court to remand for an evidentiary hearing." [Emphasis in original]. (Pet. 13, n.6). The respondent testified that he had never been apprised of the fact that he was entering a plea of guilty to the charge of attempted murder. The state had a full opportunity to show the extent of respondent's "notice and understanding" and presented not a scintilla of evidence. Respondent should not be required to relitigate issues simply because the state is later found to have failed to bear its burden of proof upon having been given an opportunity to do so.

TWARD, COOPER,
RAUB, WALINSKI
& CRAMER
PROFESSIONAL
ASSOCIATION
ADAMS STREET
ATEO, OHIO 43824

CONCLUSION

This case falls squarely within the explicit mandate of the Court in Burgett v. Texas, 389 U.S. 109 (1967). The petition for a writ of certiorari should be denied.

Respectfully submitted,

John Czarnecki, Esq.
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Norman G. Zemmelman, Esq.
BRITZ & ZEMMELMAN
340 Spitzer Building
Toledo, Ohio 43604

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HAYWARD, COOPER,
STRAUB, WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Robert Lonberger, who is now held in the Columbus Correctional Facility at Columbus, Ohio, asks leave to file the attached Brief in Oppostion to Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondent has been previously determined to be indigent and has proceeded in both the District Court and the Court of Appeals in forma pauperis pursuant to the provisions of the Criminal Justice Act of 1964.

John Czarnecki
Counsel for Respondent
Robert Lonberger

MAYWARD COOPER
STRAUB WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
ASSOCIATION
400 ADAMS STREET
TOLEDO, OHIO 43604

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CERTIFICATE OF SERVICE

The undersigned, John Czarnecki, Counsel for the Respondent, Robert Lonberger, hereby certifies that two copies of the attached Brief in Opposition were sent, by ordinary U.S. Mail, to Richard David Drake, Office of the Ohio Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 on this 18th day of March, 1981.

John Czarnecki

John Czarnecki
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Counsel for Respondent

HAYWARD, COOPER,
STRAUB, WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
ASSOCIATION
900 ADAMS STREET
TOLEDO, OHIO 43624